

Pursuant to Chapter 19A, Code of Iowa §19A.14 (1986), 581 - Ia. Admin. Code §11.1(6) (1986) and 621 - Ia. Admin. Code §§11.1 et. seq. (1986), Maureen Kelly Lang appeals her discharge from the position of "Activity Specialist" at the Mount Pleasant Correctional Facility. A hearing on Lang's appeal was held before me on October 19, 1986 in Des Moines, Iowa. The hearing was tape recorded. The parties did not file briefs.

II. ISSUE

The issue for my determination is whether the Department of Corrections had just cause to terminate Maureen Kelly Lang from the position of "Activity Specialist" at the Mount Pleasant Correctional Facility on June 25, 1986.

III. FACTS

On February 10, 1984, Maureen Kelly Lang was hired as an "Activity Specialist" at the Mount Pleasant Correctional Facility (MPCF), a medium security correctional and mental health institution. At that time, Lang, who was the only female Activity Specialist, signed a statement verifying that she had read and understood the work rules of the facility. Lang's duties as an Activity Specialist involved supervising and participating in various recreational programs for the inmates, including playing board games, physical games, such as volley ball, in the gymnasium, and supervising hobby-craft activities, as part of the over-all treatment program for residents of the facility. Lang's immediate supervisor was Jim Elliott. Initially, her second-line supervisor was a Mr. Custer, but this position was assumed by Frank Roffe when he became a Treatment Services Director in August of 1984.

On July 24, 1984, Lang was assaulted and stabbed with an upholstery needle by one of the inmates. Lang's injuries required medical treatment, and Lang filed a worker's compensation claim as a result of this incident.

Thereafter, Lang experienced difficulties in getting documents relating to the stabbing incident from MPCF that were needed in order to process her worker's compensation claim. A letter was received by John Thalacker, Deputy Superintendent at MPCF, dated October 7, 1985 and signed by Lang, requesting Thalacker's assistance in getting the necessary documents. Notations on the letter indicate it was received by Thalacker on the same day it was mailed (October 7, 1985), and further notations were made on the letter on October 8, 1985 as to how Thalacker intended to respond to Lang's request.

Frank Roffe and other staff supervisors keep written records, called "conversation cards" on which they make notations of counseling and clarification sessions with employees regarding their job performance, and various problems noted with the employees' performance. These cards are not placed in employee's personnel files, but are kept by the supervisors and are used in preparing annual performance evaluations.

From October 1984 to February 1986, Roffe noted approximately fourteen incidents on Lang's conversation cards which he felt indicated problems with her job performance. While Roffe conceded at hearing that Lang's basic job performance was very good, most of Roffe's notations reflect Roffe's concerns with Lang's demeanor and interaction with residents, including such matters as excessive familiarity with residents, showing apparent favoritism by spending too much time with particular residents, and spending too much time participating in games with residents rather than supervising them.

While Roffe made notations, or prepared conversation cards, for other employees, the record reflects that Roffe may have been more strict with Lang than with her male counterparts regarding interaction with residents. For example, Roffe told Lang that she shouldn't participate in game-playing in the gym, but rather should supervise residents, when more than a certain number of residents were present. He first set the number at 50, then lowered the number to 30, and eventually lowered it to 20. None of the other Activity Specialists were given any such specific numerical restrictions. Other Activity Specialists apparently spent considerable time playing games with particular residents without being reprimanded for showing favoritism. Testimony indicates that Roffe advised wing lieutenants and other staff members to watch Lang for incidents of favoritism, but did not do so for other Activity Specialists. Roffe testified that he didn't view this as a problem with the other Activity Specialists.

Roffe noted on some of Lang's conversation cards that one of the residents with whom Lang appeared to have difficulties was inmate Joseph Kersey, who had arrived at MPCF in June, 1985. In November 1985 Roffe noted on the cards that Lang was told on two occasions that she was spending too much time with Kersey and that she should tell him to "back off". Lang did so, and testified that Kersey appeared upset by the conversation.

On December 3, 1985, inmate Kersey was transferred from MPCF to the Clarinda Correctional Facility. On December 5, 1985, Frank Roffe called Kersey at Clarinda. Roffe and Charles Higgins, Correctional Security Director at MPCF, were conducting an investigation into allegations of misconduct made against a MPCF correctional officer by another inmate, who had told them that Kersey could corroborate the allegations because Kersey had been present when the alleged acts of misconduct occurred. The record reflects that Kersey had been involved in other investigations and had made allegations of misconduct against other staff members in the past. When Roffe called Kersey on December 5, 1985, Kersey stated that not only could he provide information about misconduct of the correctional officer being investigated, but also about misconduct of Activity Specialist Lang. Kersey wrote a letter to Roffe on January 1, 1986 and a letter to David Scurr, Superintendent of MPCF, Thalacker and Higgins on January 9, 1986, essentially repeating that he had information about misconduct on the part of both the correctional officer and Lang, without providing any specific allegations.

On January 13, 1986, Kersey was brought back to MPCF for further investigation into his allegations. On January 20, 1986, Kersey gave Roffe a written statement which included detailed allegations of misconduct on the part of Lang. Kersey's written statement alleged that he and Lang had frequent physical contact, including hugging and kissing, that Lang had given him gifts, that he had typed letters for Lang regarding her worker's compensation claim, and that Lang

had given him \$50 cash in payment for helping her with the claim. Kersey stated that Lang had shown him numerous doctor bills relating to the stabbing incident, and Kersey set out details of those bills, such as doctor's names, account numbers, amounts owed, amounts paid by Lang with specific check numbers, etc. He stated he wrote letters to Thalacker for Lang regarding her difficulties in getting information needed to process her worker's compensation claim.

After receiving Kersey's written statement, Roffe and Higgins examined Lang's worker's compensation file and found that Kersey's detailed information regarding Lang's doctor bills was accurate. They also noticed that Lang's October 7, 1985 letter to Thalacker about her worker's compensation claim looked the same as Kersey's January 1, 1986 and January 9, 1986 letters to Roffe and other MPCF administrators, indicating they may have been typed by the person on the same typewriter. Roffe and Higgins felt that these facts lent some credence to Kersey's allegations.

On February 5, 1986, Roffe and Higgins sent five letters to the Division of Criminal Investigation (DCI) for typewriting analysis - the letter to Thalacker dated October 7, 1985 and signed by Lang, Kersey's January 1 and January 9, 1986 letters to MPCF administrators, a letter Kersey had sent to the Marshall County District Court in January, 1984, and a sample typed by MPCF secretaries on Kersey's typewriter. On May 15, 1986, the DCI issued an opinion that the letters were probably all typed on the same typewriter, but suggested the typewriter itself be submitted for examination to make certain. Thereafter Kersey's typewriter was submitted to the DCI, and on May 23, 1986, the DCI issued an opinion that the documents examined were all typed on Kersey's typewriter.

While the typewriting investigation was pending, Kersey was given two polygraph examinations regarding his allegations of Lang's misconduct by Robert

Whitaker, Special Agent for the DCI. The first polygraph examination given January 28, 1986, was inconclusive, and Whitaker was unable to form an opinion as to Kersey's truth or deception. The second examination was given February 18, 1986, and it was Whitaker's conclusion that Kersey was telling the truth. The relevant questions asked of Kersey were whether he deliberately lied about receiving \$50 cash from Lang, or lied about having frequent physical contact with Lang, and Kersey responded in the negative to both questions.

In mid February, 1986, Lang received her annual performance evaluation. Testimony at hearing indicated that Jim Elliott, Lang's immediate supervisor, had initially given her a higher score on this evaluation, but that Roffe would not approve it until the score was lowered and the evaluation changed to reflect that Lang needed improvement in following policies and treating all residents equally and consistently. Lang's final overall score, however, was still above the competent level.

Lang was interviewed by Roffe and Higgins on several occasions during the course of their investigation into Kersey's allegations, and Lang repeatedly denied all of the allegations. In late January or early February, 1986, Lang filed a disciplinary report against Kersey for making false statements about her. Although Higgins testified that he knew of no way Kersey could have obtained detailed information concerning Lang's doctor bills unless Lang gave it to him, Lang testified that security was frequently lax in the area of the recreation hall and her office. Lang's uncontroverted testimony indicated that Lang's backpack has been rifled in her office while she was away, and that on one occasion she returned from the weekend to find that a pair of tennis shoes she had left in her office had been destroyed. Lang carried her doctor bills around in her backpack or left them on her desk over a period of a week or two in the fall of 1985, and notes that Kersey or others could have had access to them at that time. Lang stated to Roffe and Higgins that she wrote the letter

to Thalacker at home on her own personal typewriter. Roffe and Higgins requested Lang to take a polygraph examination regarding Kersey's allegations, and also requested that Lang bring her own typewriter in for examination, but Lang declined both requests.

By the end of May 1986, Roffe and Higgins had Kersey's written statement, the results of Kersey's polygraph examinations, and the results of the typewriter laboratory tests, in addition to Lang's conversation cards and evaluation results, all of which led Roffe and Higgins to the conclusion that Lang had breached certain rules of the institution. In mid June, 1986, Lang refused to supply her typewriter or any other evidence to refute Kersey's allegations, and continued to deny all the allegations. Consequently, Roffe sent Lang a letter of termination on June 25, 1986. The letter stated, essentially, that Lang had violated seven different MPCF rules, mainly by having physical contact with Kersey, giving him gifts, including \$50, having him type an official letter to Thalacker for her, and making false statements, all of which created a serious potential security risk for the institution. Lang appealed the termination decision.

IV. Discussion and Conclusions of Law

Section 19A.14, Code of Iowa (1987) provides that PERB hearings on appeal of decisions to discharge merit system employees shall be conducted in accordance with PERB rules and the Iowa Administrative Procedure Act (Ch. 17A, Code of Iowa), and that decisions rendered in such cases "shall be based upon a standard of just cause."

The rules of evidence set out in the Administrative Procedure Act, Code of Iowa §17A.14(1) (1987) provide, in relevant part, as follows:

Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonable prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record.

Although the burden of proof is not discussed in the applicable statute or rules, the Iowa Supreme Court has discussed the burden of proof in teacher termination cases, which also require a showing of "just cause" for termination. See Ch. 279 Code of Iowa §14 (1987). In Fort Madison Community School District v. Youel, the court said:

The parties differ sharply on the burden of proof. We are unable to see any serious problem.

The superintendent, of course, had the burden to establish the case against Youel in the first instance. Thereafter Youel, like any other appellant, must demonstrate error. This does not change the burden of proof. It merely places on the one saying the burden was not met the task of pointing out why it wasn't. 282 N.W. 2d 677, 680 (Iowa 1979).

Thus, in this case, the MPCF has the burden of proving it had just cause to discharge Lang, based upon the kind of evidence on which reasonable prudent persons are accustomed to rely for the conduct of their serious affairs.

Upon careful examination of the record, I find much of the evidence relied upon by MPCF unconvincing. As for Lang's previous work record, it is apparent that Lang was a good employee other than the problems noted by Roffe on Lang's conversation cards and evaluation instrument concerning Lang's unequal treatment and showing of favoritism to residents. As previously noted, it appears from the record that Roffe was much more zealous in noting difficulties with Lang in this regard than with other staff members. At hearing, Roffe was first very reluctant to discuss whether similar infractions were noted concerning other employees.

Lang pointed out a number of examples of other staff members engaging in apparently similar conduct (such as spending a great deal of time playing games with certain residents) without being reprimanded. Roffe conceded that he told wing lieutenants and other staff to watch Lang for these types of infractions, and did not view it as a problem with other staff members. As noted in How Arbitration Works:

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees). 1/

Other evidence relied upon by MPCF included the results of Kersey's polygraph examinations and Kersey's written statement of January 20, 1986. The results of the polygraph tests were received into evidence over Lang's objections as to the reliability of such tests. While the results of polygraph tests are not technically inadmissible under the standards of §17A.14(1) of the Code, I conclude that no weight should be given this evidence. Results of such tests are generally inadmissible in court, as well as in most grievance arbitration proceedings, where employee discharge cases are routinely considered. As noted by Elkouri & Elkouri:

Under the overwhelming weight of arbitral authority employees are not to be penalized for refusal to take lie detector tests; and where an employee does submit to lie detector testing, the test results should be given little or no weight in arbitration. Indeed, in his exhaustive examination and discussion of the polygraph, its degree of reliability, and court and arbitration decisions regarding its use, Arbitrator Edgar A. Jones, Jr., declared that "the conclusion is compelling that no matter how well

1/ Elkouri & Elkouri, How Arbitration Works, 4th Ed.; BNA, Inc., Wash. D.C. (1985); p. 684.

qualified educationally and experientially may be the polygraphist, the results of the lie-detector tests should routinely be ruled inadmissible.

Efforts to strengthen the testimony of other persons against an employee, by causing the accuser to take a lie detector test, have not impressed arbitrators. [citations omitted]. 2/

As noted by arbitrators Marvin Hill, Jr. and Anthony V. Sinicropi:

In 1974, the staff of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee concluded that "doubt must be cast upon the objectivity, accuracy, and reliability of the polygraph test." Generally, arbitrators have taken the same position. [citations omitted]. 3/

The record regarding the test results is particularly troublesome in this case, as the testimony reveals that the examiner may have formulated a subjective opinion as to Kersey's truthfulness based in part on his speculation as to motives, as opposed to relying strictly on the test results. The examiner, DCI Agent Whitaker, repeatedly stated that he forms his opinion from the polygrams themselves. However, when cross-examined by Lang as to the possibility that Kersey may have lied but somehow managed to "fool" the system or convinced himself that his lies were true in order to pass the second test, Whitaker stated,

I guess you have to look at this thing realistically. What...for what reason? Why would he do this to you? What does he have to gain by doing this to you? I mean, what would he have against you, to cause you this kind of grief? 4/

Based on the above discussion, I conclude that the polygraph results are entitled to no weight. This is not to say that the questions of motive raised

2/ Id., at pp. 315, 316.

3/ M. Hill and A. Sinicropi, Evidence in Arbitration; BNA, Inc., Wash. D.C. (1980); p. 73.

4/ Transcript of Hearing, Tape 1, Side 2.

by Whitaker are not relevant to my determination of whether MPCF established its case for discharge based on credible evidence. In determining credibility of the evidence, it is my view that the record reveals both Lang and Kersey had motives for lying. Lang has the obvious motive of protecting her job. Kersey has the inherent credibility problem of being a convicted criminal. Lang speculated that Kersey may have lied simply to gain a number of trips across the state to participate in investigations, (which he did in fact gain) or for the satisfaction of "getting back" at staff members, or exerting power over staff members who once exercised power and authority over him. In fact, Kersey had a history of "helping" MPCF in investigations which threatened employees' jobs. I find Lang's theories more plausible than the only reason advanced by Kersey for coming forward with allegations against her, i.e., in his letter to MPCF administrators of January 9, 1986, Kersey stated that if the administrators were "deeply concerned with the security of the institution", they should contact Kersey "pertaining to the unethical behavior..of the staff mentioned in order that we may bring this matter to some type of a conclusion while at the same time establishing a safer and more secure environment within the M.S.U. [Medium Security Unit at MPCF]."5/ I find it difficult to believe that Kersey's desire for a "safer and more secure environment" at MPCF motivated him to provide information about alleged improprieties in which he himself was an active participant.

Given Kersey's lack of credibility, it is my view that MPCF could reasonably rely only on such statements made by him as could be substantiated by other convincing evidence. With regard to Kersey's written statement of January 20, 1986, it is clear that Kersey had accurate and detailed information concerning Lang's medical bills. It is not clear, however, how Kersey obtained this

5/ Management Exhibit #9.

information. Given Lang's previous difficulties with security in her office area, and given Kersey's penchant for participating in investigations against staff members, it is possible that Kersey could have obtained this information without Lang's knowledge and saved it for use at a later time. It is also possible that Lang gave him the information. One puzzling point in this regard is that Kersey had been returned to MPCF from Clarinda when he gave his written statement of January 20, 1986. The information in his statement regarding Lang's medical bills was so detailed (doctor's names, account numbers, amounts paid, check numbers, etc.) that he could not have committed it to memory. He must have had some documentation on his person at the time he gave his written statement, (such as copies of the bills themselves, letters referencing the bills, etc.) but this was not produced or requested. In any event, the only conclusion supported by the record is that Lang may have provided Kersey with this information.

Kersey also alleged in his January 20 statement that he typed a number of letters for Lang regarding her worker's compensation claim, including a letter to Deputy Superintendent John Thalacker. Lang denied this allegation. MPCF substantiated Kersey's allegation by comparing the Thalacker letter, which was signed by Lang, to others typed by Kersey on his personal typewriter. The letters not only appeared identical to the naked eye, but the DCI conclusively established, through typewriter analysis, that all the letters were typed on Kersey's typewriter. At this point, MPCF met its burden of establishing a case against Lang. According to the previous discussion of burden of proof, it was than Lang's task to demonstrate error, or why the burden of proof was not met.

Lang concedes that it is her signature on the Thalacker letter. She also does not dispute the accuracy of the DCI typewriter analysis, and concedes that the letter offered into evidence was typed on Kersey's typewriter. Lang asserts that she typed a letter to Thalacker, carried it around in her backpack "for

several weeks",^{6/} unsigned, while debating whether to send it, then signed it immediately before mailing it. Lang states she was reluctant to mail the letter, believing she might suffer further reprisals or harrassment from management. Lang contends that Kersey must have obtained the letter from her backpack, typed a copy on his typewriter, and replaced his copy in her backpack in order to "set her up". She states that she finally decided to mail the letter, took it out and signed it at the post office, assuming it was her letter, and mailed it. I find Lang's explanation implausible.

In the first instance, Lang's scenario assumes not only a complex scheme on Kersey's part, but also a great deal of luck and timing. Further, an examination of all of the letters sent to the DCI reveals that they are identical in format, organization, placing of various parts of the letter, and margin placing. The Thalacker letter contains some rather unique characteristics employed in Kersey's other letters, such as an underlining of the signature, and a notation in the lower left corner of a carbon copy (cc:) followed by initials of the sender. Even the words and phrasing used in the Thalacker letter are similar to Kersey's other letters. In order to believe Lang's account, one would have to believe either that her letter-writing style and organization is coincidentally identical to Kerseys, or that she couldn't see, even at a glance, that the letter she signed at the post office was not the one she typed. Even more damaging to Lang's explanation is the fact that the Thalacker letter is dated (in type) October 7, 1985, the same day it was received in Thalacker's office. If Lang carried the letter around in her backpack for several weeks, then took it out only to sign it and mail it, why was it dated the same day it was delivered? If Kersey had switched the letters, how could he have know she would decide to mail the letter on October 7 and inserted that date? In short, I find that Lang has

^{6/} See Lang's written statement to the Adjudicator, Appellant's Exh. C., p.1.

failed to satisfactorily refute the credible evidence established by MPCF on this point.

In summary, I conclude that MPCF did not establish a case sufficient for discharge on all of the grounds alleged. MPCF did, however, establish a case against Lang, based on reliable evidence, regarding Kersey's allegation that he typed at least one letter for her to Thalacker concerning her worker's compensation claim, and that Lang lied about this to MPCF.

The fact that Kersey typed the letter for Lang indicates that she improperly involved an inmate in her personal business matters and her employment relationship with the institution, which is clearly in violation of MPCF rules. This fact alone may or may not have not been sufficient for discharge, but Lang's untruthfulness about the matter was, in itself a further rule violation, and also casts reasonable doubt on her truthfulness as to other allegations made against her. Given the need for security at MPCF, the institution has to have the utmost confidence in the honesty and trustworthiness of its staff in order to protect the safety of everyone. I conclude that MPCF established just cause for Lang's discharge.

V. AWARD

The appeal is denied.

DATED at Des Moines, Iowa this 23rd day of April, 1987.

M. Sue Warner

M. SUE WARNER, ADJUDICATOR